

Supreme Court, U. S.
FILED
MAR 7 1978
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 197..

No. **77-1455**

COMMONWEALTH OF PENNSYLVANIA
Petitioner

vs.

LEON POWELL,
Respondent

**PETITION FOR WRIT OF CERTIORARI
TO
THE SUPREME COURT OF PENNSYLVANIA**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 197____

NO. _____

COMMONWEALTH OF PENNSYLVANIA
Petitioner

VS

LEON POWELL
Respondent

PETITION FOR WRIT OF CERTIORARI

TO

THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, the Commonwealth of Pennsylvania, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Pennsylvania Supreme Court entered on December 22, 1977, in the above-captioned case.

OPINIONS BELOW

The Opinion below of the Court of Common Pleas, which is not officially or unofficially reported, is set out in the appendix. Also included in the appendix are the orders of the Pennsylvania Superior Court affirming the trial court judge and the order of the Pennsylvania Supreme Court denying the Commonwealth's Petition for Allowance of Appeal.

JURISDICTION

The Order of the Pennsylvania Supreme Court was entered on December 22, 1977. This Petition for Certiorari was filed within ninety (90) days of that denial. The jurisdiction of this court is invoked pursuant to 28 U.S. C. §1254(1).

QUESTIONS PRESENTED

A District Justice has sustained certain Commonwealth objections to defendant's cross-examination of a Commonwealth's witness at a preliminary hearing. Is the Sixth and/or Fourteenth Amendments to the United States Constitution violated when the Commonwealth, because its witness is now unavailable, seeks to introduce the transcript of a preliminary hearing at which defense counsel was present and exercised the opportunity for cross-examination.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment Fourteen Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Respondent, Leon Powell, was charged in the Court of Common

Pleas of Chester County, at numbers 1229 C and 1254 C of 1975, with possessing and selling Heroin, a violation of "the controlled substance, drug, device and cosmetic act" Act of April 14, 1972, P.L. 233, No. 64, Sec. 13 (a) 16, 30, P.S. §780-113 (a) (16)-(30). The Grand Jury approved the indictment on the above offenses on August 21, 1975. Prior to trial, the trial court heard and disposed of an Application to Extend the Time for trial by the Commonwealth as well as an Application to Dismiss filed on behalf of the defendant pursuant to Pa. Rules of Crim. Procedure 1100. The Application to Extend the Time for trial was granted, the Application to Dismiss was refused and the court then proceeded with the trial of the case. The Commonwealth told the Trial Court Judge that an essential Commonwealth witness was unavailable and that the Commonwealth proposed to use a transcript of the witness's testimony given at preliminary hearing. After hearing testimony concerning the efforts made to locate the witness, the Court ruled that the witness was unavailable, and despite defendant's objections, ruled that the transcript could be used at trial. The defendant moved for a mistrial during the reading of the transcript of the unavailable witness which motion was granted by the court on December 18, 1975.

The Commonwealth appealed from the Order of Mistrial and the defendant appealed from the 1100 ruling by the trial court. These appeals were docketed in Pennsylvania Superior Court at numbers 728 October Term 1976 and 921 October Term 1976, respectively. On June 22, 1976, the Superior Court quashed both appeals. Both the Commonwealth and the defendant filed Petitions for Allowance of Appeal with the Pennsylvania Supreme Court. On January 10, 1977, the Supreme Court vacated the Superior Court orders quashing the appeals and remanded the records to the Superior Court for consideration of those appeals. On August 24, 1977, the Superior Court, having considered the appeals on the merits, affirmed the trial judge's orders. Thereafter, the Commonwealth petitioned the Supreme Court of Pennsylvania for Allowance of Appeal. Said Petition was denied on December 22, 1977.

FACTS

Respondent, Leon Powell, was arrested for selling heroin on March 12, 1975, and March 17, 1975 in the City of Coatesville, Chester County, Pennsylvania. On May 12, 1975, the Commonwealth had produced at the preliminary hearing, Diane Susan Lazur, an undercover drug operative for the Pennsylvania Bureau of Drug Control. Ms. Lazur testified that she made these purchases from Leon Powell in his home at 751 Diamond Street (N.T. Prel. H. 5, 44). * In both instances, she paid \$100 for the substance. (N.T. Prel. H. 7, 45). There were no other agents present when Ms. Lazur made these purchases. Prior to trial, the Commonwealth put on evidence showing Ms. Lazur's unavailability. (N.T. 13-37). Following the testimony of five (5) witnesses, the trial

*Commonwealth's Exhibit "1" at trial.

judge made a finding of unavailability (N.T. 37). In addition, the trial court permitted the use of the preliminary hearing transcript (N.T. 43). Subsequently, the trial court granted defendant's motion for mistrial (N.T. 80) during the presentation into evidence of this testimony.

REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA SUPREME COURT'S RULING DENYING COMMONWEALTH'S PETITION FOR ALLOWANCE OF APPEAL, AFFIRMS THE TRIAL COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR MISTRIAL. THE TRIAL JUDGE'S ORDER WAS INCORRECT IN THAT DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO CROSS-EXAMINE OR CONFRONT WITNESSES AS GUARANTEED BY THE 6TH AND/OR 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION. DEFENDANT'S COUNSEL WAS PRESENT AT THE PRELIMINARY HEARING AND HAD ADEQUATE OPPORTUNITY FOR CROSS-EXAMINATION.

The testimony adduced at the pre-trial hearing clearly satisfied the degree of proof that is necessary to show unavailability of a witness. See Commonwealth v. Clarkson, 438 Pa. 523 (1970), Commonwealth v. Miller, 203 Pa. Super. 511 (1964), Commonwealth v. Ryhal, 274 Pa. 401 (1922), Commonwealth v. Velasquez, 449 Pa. 599 (1972), Commonwealth v. Bone, 64 Pa. Super. 44 (1916), Commonwealth v. Faison, 452 Pa. 137 (1973). The Trial Judge properly determined that the witness was unavailable and the case proceeded to trial. At trial the first forty-five pages of the preliminary hearing transcript, Commonwealth's Exhibit #1, had been read into the record when the defendant moved for a mistrial. The defendant contended that the use of the preliminary hearing transcript testimony of Commonwealth's witness, Diane Lazur, denied him the right to an effective cross-examination of the witness because of certain rulings made at the preliminary hearing level which limited the scope of defense counsel's examination. Also, defense counsel asserted that a certain statement read from the preliminary hearing transcript before the jury was so prejudicial as to require a mistrial. Subsequently, the mistrial was granted and the reasons therefore have been expressed in the Lower Court's Opinion.

The Sixth Amendment to the United States Constitution guarantees the right of an accused to be confronted with the witnesses against him. Within the field of confrontation and due process is the specific issue in this case. As stated by Justice Brennan in his dissenting opinion in California v. Green, 399 U.S. 149 (1970):

How extensive must cross-examination at the Preliminary Hearing be before Constitutional Confrontation is deemed to have occurred? If more than an unexercised chance to cross-examine is required, how thorough and effective must the questioning be before it satisfies the Confrontation Clause?

The history and interpretation of the Confrontation Clause is of some importance in this case and an excellent summary is exposed by Justice Harlan in California v. Green, supra. The Commonwealth submits that both the history of the Confrontation Clause and case law precedent indicate that there was no violation of the Constitutional rights of the defendant. In Mattox v. United States, 156 U.S. 237 (1895) the Supreme Court admitted the prior testimony of a witness shown to be unavailable and the admission of such testimony was not a violation of the Confrontation Clause. The basis holding of Mattox has been reiterated in Pointer v. Texas, 380 U.S. 400 (1975); Mancusi v. Stubb's, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); California v. Green, 399 U.S. 149 (1970). As was stated in Barber, supra, at 725-726:

Although noting that the preliminary hearing is ordinarily a less searching exploration into the merits of a case than a trial, we recognize that there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the Confrontation Clause where the witness is shown to be actually unavailable . . .

And further in California v. Green at 166:

In the present case respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of this examination of the witness, Porter, at the preliminary hearing. If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purpose behind the Confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State.

Based on the above case law, it is apparent that the critical determination made in the above cases is whether the State exhibited a good faith showing of unavailability so as to warrant the introduction of notes of testimony from a prior proceeding. The record of testimony in the present case offered by the Commonwealth at the pretrial hearing was

clearly sufficient to show the unavailability of the Commonwealth's witness, Ms. Diane Lazur.

Putting aside the argument of Justice Harlan as to whether the Confrontation Clause requires more than the prosecution producing available witnesses it seeks to use at a criminal trial, the parameters of the "opportunity for cross-examination" must be explored regardless of whether the opportunity is guaranteed by the Confrontation Clause or by the Due Process Clause of the United States Constitution. In Pointer v. Texas, supra, the Supreme Court noted:

The case before us would be quite a different one had Phillip's statement been taken at a full fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine.

The Pennsylvania cases examined the above stated question using the same phraseology wherein in Commonwealth v. Miller, supra the Court states:

Defendant's next contention is that the Court erred in permitting the aforesaid testimony of Donato to be read in violation of their Constitutional Rights under the Sixth and Fourteenth Amendments to the Constitution of the United States since they had no opportunity to confront the witness. However, defendants did have that opportunity at the preliminary hearing, where they were represented by Counsel, who cross-examined Donato at that time.

And in Commonwealth v. Velasquez, supra at 604:

The cross-examination conducted by appellant's counsel at the degree of guilt hearing confirms the presence of opportunity and motive for adequate cross-examination and the fact that appellant's counsel properly utilized the opportunity.

See also Commonwealth v. Faison, supra; Commonwealth v. Hall, 232 Pa. Super, 412 (1975); Commonwealth v. Ryhal, supra. The underlying question of establishing what the opportunity for cross-examination means has been mentioned infrequently in Commonwealth cases. In Commonwealth v. Velasquez, supra, the Court after talking of the opportunity to cross-examination commented that, "during the degree of guilt hearing appellant's counsel exploited the weakness of Willingham's direct examination by establishing that the witness never saw appellant shoot the deceased—the witness only saw appellant firing a

gun inside the bar. Appellant's counsel by proper cross-examination challenged the accuracy of the witness's testimony by demonstrating that the witness was outside the bar fifty feet away and been drinking shortly before observing these events." The opportunity for cross-examination could be inferred to mean from the above quoted opinion that defense counsel exploited the weakness of the direct examination of the Commonwealth's witness and in Commonwealth v. Ryhal, supra, the Court stated at 412:

So far as opportunity to cross-examine is concerned, the record shows the cross-examination filled eighteen type-written pages. Upon only two matters of any consequence was full opportunity to cross-examine denied by the rulings of the committing Magistrate, the identity of the defendant and the statements alleged to have been made by the witness to a police matron. As to the first, in a petition for change of venue and on the trial, the defendant admitted his identity; and as to the second, the girl denied that she had had any conversation with the police matron, and thus full opportunity was given to contradict her testimony on the trial if it was desired to do so, but the police matron was not produced as a witness.

Further, a leading commentator relates that:

"Former testimony, to be admitted under this exception to the hearsay rule, must have been given under the sanction of the oath or such form or affirmation as is accepted as legally sufficient. More important, because more often drawn in question, is the requirement that the party against whom the former testimony is now offered, or a party in like interest, must have had a reasonable opportunity to cross-examine." McCormick Evidence Section 255 at 616 (1970).

In light of the obscurity and vagueness of the law with regard to exactly what is the opportunity for cross-examination, the Commonwealth submits that in addition to the case law already set forth the most helpful and logical analysis to be followed in this area is that used in Dutton v. Evans, 400 U.S. 74 (1970), wherein the Court discussed the interrelationship or lack of it, between the hearsay rule and the Confrontation Clause. The Supreme Court stated at 89;

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the trier of

fact has a satisfactory basis for evaluating the truth of the prior statement.

Further, in Commonwealth v. Hall, supra, the Court in speaking of the improper use of a transcript from a Juvenile Hearing at a later trial where the same criminal issues were not aligned stated at 417, "without the opportunity to cross-examine, the prior testimony lacks sufficient 'indicia of reliability' to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." It is the law of Pennsylvania that, "well recognized exceptions to the Hearsay Rule supported by circumstances guaranteeing sufficient indicia of reliability do not raise Confrontation problems." Commonwealth v. Ransom, 446 Pa. 457, 461 (1972).

The testimony of the Commonwealth witness Diane Lazur that was transcribed at the preliminary hearing was possessed of sufficient indicia of reliability to warrant it being placed before the jury for their evaluation. There is support in the Commonwealth of Pennsylvania for this analytical approach toward testimonial evidence offered in the form of a preliminary hearing transcript. In Commonwealth v. Clarkson, supra, the Court stated at 525:

Our basic concern is for the reliability of the testimony which was elicited in the preliminary hearing, and we do not feel that its reliability is affected by the scope or focus of the proceeding. It would certainly be more desirable to have the witness present at trial, but it would be vastly less desirable to exclude such evidence altogether.

Focusing on the notes of testimony from the preliminary hearing, it appears that defense counsel faced adverse rulings by the District Justice on six occasions during the preliminary hearing examination. On page 13 of Commonwealth exhibit "1," the Commonwealth objected to the defense counsel's inquiring as to the location of the field office for the Coatesville area drug operation because the location of the Pennsylvania Bureau of Drug Control field office could not be divulged for security reasons, not the least of which was providing safety for the undercover information, Diane Lazur. It was clear from the testimony that immediately followed defense counsel's question as to the location of the field office that the substance of the information that defense counsel inquired about was testified to in some detail. On page 25 of Commonwealth's exhibit "1" the Commonwealth objected to the question: "Apart from the forgery conviction and the pending theft charges, do you have any other convictions?" The reason for the objection was the overbreadth of the question and the fact that it called for an answer by the witness that would be potentially inadmissible according to the

case law in Pennsylvania. See Commonwealth v. Eighum, 452 Pa. 554 (1973); Commonwealth v. Zapata, 455 Pa. 205 (1974); Commonwealth v. Jackson, 230 Pa. Super. 386 (1974). In fact, defense counsel was permitted to question on prior crimes where an arrest had occurred and not a prior conviction. (N.T. 21, 22, 23.)

On page 26 of Commonwealth's exhibit "1" the Commonwealth objected to the following defense questions: "Were you paid while you were in an undercover capacity?" Since the preliminary hearing was to determine if a prima facie case was made out against the defendant, the Commonwealth objected to the above question since its answer would not be determinative to a showing of whether a prima facie case was established. On pages 23 and 24 of Commonwealth's exhibit "1" the record reflects that the Commonwealth's witness stated that in effect no deal had been made with the law enforcement authorities and she further testified on page 27 that she received her money from Welfare. By implication the defense received the answers to whether she was paid because Ms. Lazur stated her source of money was from Welfare. It is noted that the Commonwealth made an offer of proof at trial that one Michael Hirsch, of the Pennsylvania Bureau of Drug Control, would have testified to the entire relationship between their department and Ms. Lazur and therefore the answers given by Ms. Lazur at the preliminary hearing could have been contradicted at trial, if untrue. The Pennsylvania authority for the above technique is stated in Commonwealth v. Ryhal, supra, wherein the Court determined that the opportunity does exist for defense counsel to bring in witnesses to contradict statements that have been testified to by an unavailable Commonwealth witness. On page 27 of Commonwealth's exhibit "1" the District Justice sustained a Commonwealth objection to the following question: "Now, when did you buy your new car?" Never in the context of the testimony immediately prior to said question was it established that Ms. Lazur had purchased a new car so that an insufficient foundation for the question was present. Further, the argument presented above is relevant here in that Ms. Lazur testified to the lack of any deals or leniency between her and the law enforcement authorities.

On page 28 of Commonwealth's Exhibit "1," the Commonwealth objected to the following question: "You haven't had to file any waiver of anything?" The Commonwealth objected because the question was literally asked four questions prior to the one to which the objection was sustained. The witness answered she didn't know what the waiver was and further answered that the case was never called to trial. The answer given sufficiently answered the point of defense counsel's inquiry. Again, Ms. Lazur affirmatively answered that there were no deals or terms of leniency between her and the law enforcement authorities so that her testimony was preserved for contradiction if any

relationship of that type was in fact present. On page 32 of Commonwealth's Exhibit "1," the District Justice sustained a Commonwealth objection to Defense Counsel's question as follows:

"Ms. Lazur isn't it true that you got out of jail in February as a direct result of the intervention of the law enforcement authorities?"

Again, the Defense Counsel was probing to whether a deal was negotiated between Ms. Lazur and the law enforcement authorities. The Commonwealth objected because it had been established previously by Ms. Lazur's testimony that no leniency or deals had been given for her cooperation as an undercover drug operative.

The Commonwealth submits that the rulings of the District Justice at the preliminary hearing did not deny the defendant any of his Constitutional Rights and that the testimony was properly offered at trial in accordance with the former testimony exception of the hearsay rule. In addition, an examination of the testimony of Ms. Lazur at the preliminary hearing shows that Defense Counsel did not delve into the basic facts of the drug transaction. The Commonwealth submits that there is no challenge to the identification of the accused or to the circumstances of the transaction itself. There was testimony that Ms. Lazur knew the defendant for approximately two years and the details of the drug purchase were explored by the Defense Counsel without objection by the Commonwealth. Thereafter, Defense Counsel confined his cross-examination essentially to the past history of Ms. Lazur and to her relationship with the law enforcement authorities. It was only to this portion of the cross-examination of Ms. Lazur that the Commonwealth interposed objections to which the District Justice acted.

In the area of cross-examination and the discretion that the trial judge may exercise thereto, the case of United States v. Banks, 520 F. 2d 627 (1975) contains legal analysis that is helpful to the fact situation at hand. In Banks, the defendant was precluded from inquiring into whether the witness (not a preliminary hearing transcript) testifying was using drugs at the time of the trial. Further, the Defense was not allowed to produce a medical doctor to testify that the prosecution witnesses were engaged in methadone programs during the trial. Although the Court felt that the defendant should have had the opportunity to receive a response to his question related to present drug use at the trial, the Court added at 631:

"Appellant's elicited, on cross-examination, substantial information concerning Pottgiesser's prior use of drugs. While the issue of witness's drug use during trial had considerable relevance to credibility, we conclude that

had the jury found his testimony to be at all confused or uncertain, the admissions before them would have been sufficient for consideration in their ultimate determination of the truthfulness and the reliability of his testimony."

The holding in Banks is of importance in the present case because it stands for the principle that was enunciated in California v. Green, supra, and Dutton v. Evans, supra, that the testimony is admissible if it has a sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. The record in Banks contained various admissions by the prosecution witness as to drug use and his relationship between himself and the law enforcement agency. Because the jury was made aware of this the Court felt that a satisfactory basis for evaluating the truth was exhibited.

The Commonwealth submits that the record of the preliminary hearing testimony in the present case clearly put the issue of Ms. Lazur's credibility before the jury so that the jury had a satisfactory basis for evaluating the truth of her testimony.

Finally, it is noted that the elements of the former testimony exception to the hearsay rule were established and the testimony was properly put before the jury in accordance with the aforesaid rule. Just as a dying declaration is admissible evidence because of the inherent reliability of the statement so too should the reliability of the evidence be the crucial determination in the present case.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

RESPECTFULLY SUBMITTED,

DONALD A. MANCINI
Assistant District Attorney

FRANK J. WILLIAMS
Deputy District Attorney

WILLIAM H. LAMB
District Attorney

4TH FLOOR, COURT HOUSE
WEST CHESTER, PENNSYLVANIA 19380

Appendix A
Supreme Court of Pennsylvania
Eastern District

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

PHILADELPHIA, 19107
December 27, 1977

Frank J. Williams, Esq.
Deputy District Attorney
Chester County Court House
West Chester, Pa. 19380

Re: Commonwealth, Petitioner v. Leon Powell
No. 3202 Allocatur Docket

Dear Mr. Williams:

This is to advise that the following Order has been endorsed on the
Petition for Allowance of Appeal filed in the above-captioned matter:

"December 22, 1977

Petition denied

Per Curiam"

Very truly yours,

Sally Mrvos
Prothonotary

SM:ejh

cc: Michael Kean, Esq.

(Exhibit "G")

No. 669/1977

COMMONWEALTH OF PENNSYLVANIA, : In the Superior Court
Appellant : of Pennsylvania

v.

LEON POWELL : No. 728
October Term, 1976

COMMONWEALTH OF PENNSYLVANIA : In the Superior Court
: of Pennsylvania

v.

LEON POWELL, : No. 921
Appellant : October Term, 1976

COMMONWEALTH OF PENNSYLVANIA : CRIMINAL
ACTION-LAW

v. : NOS. 1229C,
1254C - 1975

LEON POWELL :

Appeals from the Orders of the Court of Common Pleas, Criminal
Division, Chester County, at Nos. 1229, 1254 C of 1975.

PER CURIAM: FILED: August 24, 1977

Orders affirmed.

Appendix B

(Exhibit "F")

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF : CRIMINAL
PENNSYLVANIA : ACTION-LAW
v. : NOS. 1229C,
LEON POWELL : 1254C - 1975

OPINION

Defendant, Leon Powell, proceeded to trial before a jury having been charged with a violation of the Controlled Substance, Drug, Device and Cosmetic Act. Prior to trial the Court heard and disposed of an application to extend the time for trial by the Commonwealth as well as an application to dismiss filed on behalf of the defendant pursuant to Rule of Criminal Procedure 1100. The application to extend the time for trial was granted, the application to dismiss was refused and the Court then proceeded with the trial of the case.

In addition to the aforementioned applications, the Commonwealth then called to the attention of the Court that due to the fact that an essential Commonwealth witness was unavailable, the Commonwealth proposed to use a transcript of that witness's testimony given at a preliminary hearing. After hearing testimony concerning the efforts made to locate the witness, the Court ruled that the witness was unavailable and, despite defendant's objections, ruled that the transcript could be used at the trial. The trial was aborted when, during the reading of the transcript of testimony of the unavailable witness, defendant moved for a mistrial which was granted by the Court.

The Commonwealth has appealed from the granting of that mistrial. In addition, defendant has appealed from the order of the Court refusing his application to dismiss pursuant to Pa.R.Crim.P. 1100.

This Court recognizes that perhaps the Commonwealth was premature in filing its appeal. However, the Court is of the opinion that the order appealed from involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter. See Act of July 31, 1970, P.L. 673, No. 223, Art. V, §501, 17 P.S. 211.501. The question of law involves the admissibility into evidence of a transcript of testimony given at a prior proceeding by a witness who is unavailable at the time of trial.

Prior to trial the Court heard testimony concerning the unavailability of the witness, Diane Lazur. She was an individual who accompanied certain police officers to the home of the defendant and it was she who allegedly made the purchases of heroin which was the subject of the charges against defendant. From the testimony presented to the Court, the Court was of the opinion that she was an unavailable witness and directed its attention to whether or not her transcript should be admitted into evidence.

The testimony disclosed that defendant appeared at his preliminary hearing with counsel. The witness was subjected to cross-examination by defendant's counsel. However, defendant objected to the admissibility of the transcript on the grounds that certain material was contained therein which would be prejudicial if read during the course of the trial. In addition, defendant questions certain rulings by the District Justice which limited the scope of cross-examination. After a conference with defense counsel and the Assistant District Attorney, the Court recessed the trial to give the Commonwealth an opportunity to review the transcript with defense counsel in an effort to decide what testimony should be admitted and what should not. When the trial resumed the following day, it became evident that this was not done. After considering defendant's motion the Court was of the view that the interests of justice mandated a mistrial and granted the motion.

The question of whether or not a transcript of testimony given by an unavailable witness should be admitted into evidence at the trial of the charge has been discussed by our courts in several instances. In *Commonwealth v. Clarkson*, 433 Pa. 523 (1970) the court held there was no error in admitting into evidence a transcript of testimony given by a deceased witness. Again in *Commonwealth v. Velasquez*, 449 Pa. 599 (1972) testimony given at a degree of guilt hearing was admitted into evidence. In that case the court in a footnote commented on the *Clarkson* case (*supra*) wherein testimony given at a preliminary hearing was held to be properly admissible. The court explained its reliance on prior case law citing *Commonwealth v. Ryhal*, 274 Pa. 401 (1922), *Commonwealth v. Keck*, 148 Pa. 639 (1892) and *Commonwealth v. Miller*, 203 Pa. Super. 511 (1964). Thus, where the defendant has been represented by counsel at the prior proceeding and counsel was given the opportunity to cross-examine the witnesses, the constitutional prerequisites are met.

In this case defendant was represented by counsel who was given the opportunity to cross-examine at the preliminary hearing. However, an examination of the notes of testimony indicates to this Court that the District Justice sustained objections to a line of questioning which attempted to ascertain whether the witness was a paid informer or

whether she had been offered any other inducement to testify as a Commonwealth witness. In view of the nature of the witness as evidenced by the testimony elicited before the District Justice, it appeared to the Court that those questions would have been permitted at the trial if that witness were present to testify. The Court was of the opinion, therefore, that there was no identity of opportunity to cross-examine at the preliminary hearing and at the trial. It was for this reason that the Court suggested a review by both parties of the transcript in an effort to keep out any objectionable material. Since no agreement had been reached and since a further review convinced the Court that certain portions of the transcript were being deleted by the Commonwealth, sua sponte, and since rulings made on objections by the Commonwealth to defendant's questions on cross-examination appeared to limit the right to attack the credibility of the witness, it was the opinion of this Court that a mistrial was proper.

Defendant's appeal is from the Court's order granting the Commonwealth's petition to extend the time for trial. This action of the Court was based on the fact that the petition to extend was filed within the 180-day period required by Rule 1100. Since the cases of Commonwealth v. Mayfield, ____ Pa. Super. ____ (1976) filed March 29, 1976 and Commonwealth v. Shelton, ____ Pa. Super. ____ (1976), it may be that this Court was in error in extending the time for trial and in refusing defendant's application to dismiss. However, the reasons for the Court's order were that the petition to extend was timely filed, the matter had been listed for trial at least once prior to the date it was actually called, and on one occasion it was continued by reason of the fact that a relative of defendant's counsel was ill.

BY THE COURT:

Dated: June 16, 1976

Certified From The Record

This 16th day of June, 1976

Attest

Deputy Clerk of Common Pleas Court